Supreme Court, U.S.
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No. 96-1853

In The

Supreme Court of the United States

October Term, 1996

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

vs.

ESTATES OF RED WOLF AND BULL TAIL, VALERIE RED WOLF, GLADYS RED WOLF, RANDY RED WOLF, DORRIE BULL TAIL, DEWEY BULL TAIL, AND RON ARNESON, CROW TRIBAL COURT SPECIAL JUDGE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ESTATES OF RED WOLF AND BULL TAIL

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LIST OF INTERESTED PARTIES

The Petitioner is Burlington Northern Railroad Company.

The Respondents are correctly identified in the caption.

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OPINIONS BELOW

The Ninth Circuit Court of Appeals determined that the District Court erred in exercising its jurisdiction because Petitioner BN had not exhausted its Tribal Court remedies. BN sought a petition for rehearing *en banc* and no judge of the Ninth Circuit Court of Appeals requested a vote on the suggestion for rehearing *en banc*. This decision is reported at 106 F.3d 868. Pet. App. 1a-15a. Respondents Estates of Red Wolf and Bull Tail, Valerie Red Wolf, Gladys Red Wolf, Randy Red Wolf, Dorrie Bull Tail, and Dewey Bull Tail shall be referred to herein as "Red Wolf".

STATEMENT OF JURISDICTION

Petitioner (BN) seeks to invoke the jurisdiction of this Court through 28 U.S.C. § 1254(1) and Rule 10 of the Supreme Court Rules.[1] Rule 10 provides that a petition for a writ of *certiorari* will be granted only for special and important reasons. The rule then recites the reasons. Here, the Ninth Circuit Court of Appeals has *not* rendered a decision in conflict with the decision of any other United States Court of Appeals on the same matter nor has it in any way "departed from the accepted and usual course of judicial proceedings" but, on the contrary, has prevented the Federal District Court from doing so. Furthermore, the Ninth Circuit has not decided a question of federal law which has not been but should be settled by this Court but, on the contrary, has dutifully followed the mandate of this Court regarding the exhaustion of tribal court remedies. Under the circumstances, BN's petition does not fall within the ambit of Rule 10 of the Supreme Court Rules.

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1. BN was required by Rule 14.1(g)(ii) to state the basis for federal jurisdiction in the Federal District Court. BN has failed to do so. There was no jurisdiction properly exercised by the Federal District Court because BN failed to exhaust its Crow Tribal Court remedies.

INTRODUCTION

BN has petitioned this Court for a writ of *certiorari* claiming there is a conflict in the Circuits as to the appropriate application of the Tribal Court exhaustion doctrine set forth in *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987). There is *no* conflict in the Circuits on this issue and hence, no basis for a writ of *certiorari*.

The BN also seeks a grant, vacate, and remand order (GVR) on the basis of this Court's recent decision in *Strate v. A-1 Contractors*, __ U.S. __, 117 S. Ct. 1404 (1997). This case is factually distinguishable from *A-1 Contractors* and there is no need for GVR in this case. *A-1 Contractors* involved no tribal members, whereas this case involves two deceased tribal members and the railroad, a non-tribal member. The accident in *A-1 Contractors* took place on non-Indian land, that is, on a state highway right-of-way, open to the public, from which the Indian Tribe had totally divested itself of title to the land. In this case, the Crow Tribe owns the title to the land comprising the railroad right-of-way where the accident occurred.

A-1 Contractors is a jurisdiction case, not a "failure to exhaust tribal remedies" case. The Ninth Circuit decision was based on BN's failure to exhaust tribal remedies and BN's request for a GVR on the basis of *A-1 Contractors* is inappropriate.

STATEMENT OF THE FACTS

BN has set forth its "Statement of the Case" on pages 1 through 14 of its petition. Most, if not all, of BN's statement is self-serving argument, as compared to fact, and designed to convince this Court to grant a writ under inappropriate

circumstances. The correct statement of the facts is contained in the Ninth Circuit's opinion. (Pet. App. pp. 1a-9a). These verbatim facts are as follows:

> A jury in Crow Tribal Court awarded $250 million to the heirs of two tribal members killed when a Burlington Northern Railroad train hit their car at a railroad crossing on the reservation. Under the Crow Tribal Code, execution on the judgment was automatically stayed for ten business days. The Railroad moved to stay the judgment and to waive the Code's supersedeas bond requirement pending its appeal to the Crow Court of Appeals. The trial court denied the motion and ordered the Railroad to post bond in the amount of the judgment plus interest as required by Rule 18 of the Crow Tribal Court. The Railroad appealed that bond ruling. *Before* the tribal appellate court ruled on that question, the Railroad sought and received a temporary restraining order in federal court enjoining enforcement of the tribal court judgment.
>
> The tribal trial court held a previously scheduled hearing regarding posting of a supersedeas bond, but the Railroad refused to post such a bond and presented no alternatives to secure the judgment. The trial court held that without the Railroad's participation it could not modify its previous order. The Tribal Court of Appeals declined to review the trial court's bond order until after that court entered final orders

concerning the specific security required as a condition of staying the judgment. It provided guidelines for the trial court's determination of the appropriate bond or other security required and directed that court to stay all proceedings to execute on the judgment and any requirement for security during the pendency of any restraining orders issued by the district court. It further instructed the trial court to proceed to determine the appropriate form of security to be implemented *when all federal restraining orders were lifted.*

Meanwhile, the district court granted the Railroad's motion for a preliminary injunction against execution or enforcement of the tribal court judgment. The injunction was intended to "maintain [] the status quo and preserv[e] the court's jurisdiction should future federal litigation occur in this matter."

* * *

The railroad argues that the tribal courts had an adequate opportunity to decide whether or not it must post a supersedeas bond. Its motion for a stay from posting a bond in tribal court was considered by both the tribal court and the tribal appellate court. *It concedes, however, that there was no final ruling on the form and amount of security that would suffice to stay the judgment.*

The district court acknowledged that

> *tribal remedies had not been exhausted*, but nevertheless exercised its injunctive power to maintain the status quo and to preserve its jurisdiction. . . .
>
> *The Railroad does not argue that a National Farmers exception applies.* But it does argue that further tribal court proceedings to determine the amount of a bond or the nature of other security would be futile because it could not risk posting a bond or other security in tribal court. . . .
>
> The Railroad's "futility" argument cannot be construed as an exception to the exhaustion requirement. The *National Farmers* futility exception applies where exhaustion would be futile because of lack of adequate opportunity to challenge the court's jurisdiction. *National Farmers*, 471 U.S. at 856 n.21. *The judgment creditors here agreed to condition the supersedeas bond upon completion of all available federal review.* Regardless of the extent of review available, it may not be said that there is inadequate opportunity to challenge the court's jurisdiction when, as here, federal review of tribal court jurisdiction is assured.

(Pet. App. pp. 5a, 6a, 7a, 8a) (emphasis added).

BN's and the Federal District Court's interference with the tribal court procedure concerning the supersedeas bond, did not maintain "the status quo". The District Court's action stripped the Tribal Trial and Appellate Courts of any authority to proceed with the supersedeas bond issue.

The District Court interjected itself into the Tribal Court process, before BN had even begun to exhaust its Tribal Court remedies. The District Court was presented with a vast number of BN contentions regarding BN's claim of "unfairness". The District Court, based on BN's allegations, made a finding on the "probable success on the merits", on "the possibility of irreparable injury" and on "the balance of hardships". (Pet. App. p. 20a). These are the very issues being raised by BN in the Tribal Court proceedings, which proceedings were "stopped cold" by the District Court's order. In its February 21, 1996 order, the Crow Court of Appeals fully understanding the concept of "comity", abstained, stating:

> Based on principles of comity, the Tribal [trial] Court should stay all proceedings to actually execute on the judgment and any requirement for actually posting security during the pendency of any restraining orders issued by the U.S. District Court.

(Red Wolf App. pp. 22a-23a). The United States Supreme Court mandates that the Federal District Court abstain, *not that the Tribal Court abstain.*

REASONS FOR DENYING THE WRIT

I.

NO CONFLICT EXISTS AMONG THE CIRCUIT COURTS ON THE TRIBAL COURT EXHAUSTION DOCTRINE.

The law on exhaustion of tribal court remedies was determined by this Court in *National Farmers Union Insurance Co. v. Crow Tribe* and *Iowa Mutual Insurance Co. v. LaPlante.* In *National Farmers Union*, this Court stated:

> [U]ntil petitioners have exhausted the remedies available to them in the Tribal Court system, n 4, supra, it would be premature for a federal court to consider any relief.

Id. at 857.

In *Iowa Mutual*, this Court clarified its position in *National Farmers* stating:

> We concluded that, . . . *considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court. . . .*
>
> *. . . Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction." . . . Adjudication of such matters by any nontribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.*
>
> *As National Farmers Union indicates, proper respect for tribal legal institutions requires that they be given a "full opportunity" to consider the issues before them and "to rectify any errors."* 471 U.S. at 857, 85 L. Ed. 2d 818, 105 S. Ct. 2447. . . . *In this case, the Tribal Court has made an initial determination that it has jurisdiction over the insurance dispute, but* ***Iowa Mutual***

> *has not yet obtained appellate review, as provided by the Tribal Code, ch 1, § 5. Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.*
>
> * * *
>
> Although petitioner must exhaust available tribal remedies before instituting suit in federal court, the Blackfeet Tribal Courts' determination of tribal jurisdiction is ultimately subject to review.

Id. at 14-19 (emphasis added).

The exhaustion of the tribal court remedies rule has been applied uniformly throughout the United States by the Circuit Courts. BN claims that a conflict exists because of the Seventh Circuit decision in *Altheimer and Gray v. Sioux MFG, Corp.*, 983 F.2d 803, 814-815 (1993). In *Altheimer and Gray*, the Indian manufacturing company "explicitly agreed" to submit to the venue and jurisdiction of federal and state courts located in Illinois for the purpose of construing state contract law. The Seventh Circuit found, in light of this agreement:

> To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination. The Tribe created SMC to enhance employment opportunities on the reservation. As the Ninth Circuit recognized, economic independence is the foundation of a tribe's self-determination. If contracting parties cannot

> trust the validity of choice of law and venue provisions, SMC may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught. We therefore affirm the district court's denial of SMC's motion for a stay of proceedings based on the tribal exhaustion rule.

Id. at 815. *Altheimer and Gray* creates no conflict but merely emphasizes the exhaustion doctrine.

This Court in *National Farmers* and *LaPlante* determined that exhaustion of tribal court remedies was mandatory. However, this Court set forth certain exceptions:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," cf. Juidice v. Vail, 430 US 327, 338, 51 L. Ed. 2d 376, 97 S. Ct. 1211 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, n. 21 (1985).

As the Ninth Circuit stated, below: "The Railroad does not argue that a *National Farmers* exception applies." (Pet. App. p. 8a). BN obviously cannot argue, for the first time on a petition for writ of *certiorari*, that a *National Farmers* exception applies.

Adikes v. Kress & Co., 398 U.S. 144, 147 n. 2 (1970). BN did not previously argue "harassment", "bad faith", or that Red Wolf's death claims were "patently violative of express jurisdictional prohibitions". BN meekly argued to the Ninth Circuit that it would be futile to post a bond because it would not have an opportunity to challenge the Tribal Court's jurisdiction. In rejecting this argument, the Ninth Circuit stated:

> The Railroad's "futility" argument cannot be construed as an exception to the exhaustion requirement. The *National Farmers* futility exception applies where exhaustion would be futile because of lack of adequate opportunity to challenge the court's jurisdiction. *National Farmers*, 471 U.S. at 856 n. 21. The judgment creditors here agreed to condition the supersedeas bond upon completion of all available federal review. Regardless of the extent of review available, it may not be said that there is inadequate opportunity to challenge the court's jurisdiction when, as here, federal review of tribal court jurisdiction is assured.

(Pet. App. pp. 8a-9a). BN has no futility argument.

There simply is no conflict among the Circuits on this issue. BN has made no serious effort to support its claim that such a conflict exists. A writ of *certiorari* would certainly be inappropriate on the basis that a conflict in this area of the law exists.

II.

GVR IS INAPPROPRIATE ON THE BASIS OF *A-1 CONTRACTORS*.

BN has asked this Court to grant, vacate, and remand, claiming the Ninth Circuit decision conflicts with *A-1 Contractors*. Such statement is inaccurate. *A-1 Contractors* is a jurisdiction case, not a "failure to exhaust tribal remedies" case.

BN's comparison of the two cases is inaccurate. In *A-1 Contractors*, neither of the parties were tribal members. In the case at bar, two of the deceased parties were tribal members and the other party was a railroad, a non-tribal member. In *A-1 Contractors*, the accident occurred on a part of the state's highway where the right-of-way was *open to the public*. The tribe, in granting the land for the state highway in *A-1 Contractors*, "expressly reserved no right to exercise dominion or control over the right-of-way". 117 S. Ct. 1404, 1414. In the case at bar, the accident giving rise to Red Wolf's claims occurred on land to which the Crow Indian Tribe holds title. The accident, in other words, did not occur on alienated non-Indian land, but on land owned by the Tribe.

In *United States v. Soldana*, 246 U.S. 430 (1918), this Court specifically held that the Crow Tribe holds title to the land encompassing BN's right-of-way where the subject accident occurred.[2] The issue before this Court was whether the Indian title to the soil on which the station platform stood had been

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2. The CB&Q acquired the original right-of-way through the Crow Reservation from the Big Horn Southern Railroad under Act of March 1, 1893, Chap. 192 (27 Stat. at L. 529). In 1970, the CB&Q merged with other railroads to create the Burlington Northern Railroad Company which thereafter maintained and operated the right-of-way. *See United States v. ICC*, 396 U.S. 491 (1970).

extinguished by Congress' grant of the right-of-way or whether the railroad merely had a right-of-way or other limited interest in the land on which to construct and operate a railroad. The Court analyzed and construed the acts of Congress granting the right-of-way to the railroad, and concluded "it is clear that it was not the purpose of Congress to extinguish the title of the Indians in the land comprised within the right-of-way". *Id.* at 532-33.[3]

BN has represented to this Court that the Crow Tribe does not own the land within the railroad right-of-way. *Soldana* renders this statement untrue. The same conclusion was reached by the Montana Supreme Court in *Burlington Northern RR Co. v. Montana Dept. of Public Service Regulation*, 720 P.2d 267 (Mont. 1986). BN has known of these rulings, has not brought them to the attention of this Court, but still inexplicably argues to this Court that the railroad right-of-way, owned by the Tribe, must be treated exactly as the highway right-of-way in *A-1 Contractors*, not owned by the Tribe.

The railroad right-of-way at issue in *Soldana* and in *BNRR Co. v. Montana Dept. of Public Service Regulation*, is the *same* right-of-way on which the subject accident occurred. Under these circumstances, and given this Court's ruling in *Montana v. United States*, 450 U.S. 544 (1981), that *tribes retain civil jurisdiction over non-member conduct on tribal lands*, it is "plain" that the Tribal Court does have jurisdiction in this case.[4]

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3. The acts of Congress construed and interpreted by the Court were the same acts relied upon by BN in this case for the proposition that the Crow Tribe does not hold title to the land underlying the right-of-way. *See* Pet. App. p. 43a; Pet. Br., pp. 16-17.

4. The presumption in favor of Tribal Court jurisdiction over non-member conduct *on tribal lands* articulated in *Montana* makes it unnecessary to discuss the two *Montana* "exceptions" which apply only in the face of *Montana*'s "main rule" governing non-tribal lands, not applicable here.

Even if there is an exception to the exhaustion rule for highway right-of-way cases where Tribal Court jurisdiction is "plainly" absent, this is "plainly" not such a case. The Ninth Circuit properly applied the Tribal Court exhaustion doctrine required by this Court in *National Farmers Union* and *LaPlante*, and such application does not conflict with *A-1 Contractors*.

In *A-1 Contractors*, this Court stated: "We express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation." 117 S. Ct. 1404, 1408. Not only did the subject accident occur on the BN right-of-way which was owned by the Crow Tribe and susceptible to taxation by the Crow Tribe [*BN v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991)], the accident also occurred on an intersecting road on the reservation. Since the record does not disclose whether the road was a tribal road, a county road, or a private road, it will be up to the Crow Court of Appeals to make such a determination in the first instance.

In *A-1 Contractors*, the road was undeniably owned by the state, and the tribe had given up all dominion and control. Under these circumstances, it can hardly be said that the Tribal Court "plainly" has no jurisdiction in this case. There simply is no comparison to be drawn between the case at bar and *Strate v. A-1 Contractors*.

A-1 Contractors did not change the mandatory nature of the exhaustion rule, nor did it change the exceptions. Indeed, exhaustion was not even an issue in the case.[5] The Court's discussion of the exhaustion requirement in *A-1 Contractors* was not a reformulation of the doctrine but merely a reiteration that

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5. The Federal Court action in *A-1 Contractors* was not filed until after both the Tribal Trial Court and the Northern Plains Intertribal Court of Appeals had finally ruled on the issue of tribal court subject-matter jurisdiction. *See A-1 Contractors v. Strate, supra*, p. 3.

National Farmers and *LaPlante* are exhaustion cases and not jurisdictional cases.

This Court in *A-1 Contractors* confirmed that both *National Farmers* and *LaPlante* "describe an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction". When the Court commented, in footnote 7, that exhaustion is not an "unyielding requirement", it was specifically referring to the exceptions of "harassment", "bad faith", "futility", and actions "patently violative of express jurisdictional prohibitions", established in *National Farmers*. The Court did not add to those exceptions and did not in any way dispense with the abstention rule of tribal court exhaustion.

Finally, the Congressional Act, 25 Stat. 660, which created this right-of-way, placed a specific duty on BN to conduct its railroad operations "with due regard to the rights of the Indians". (Pet. App. pp. 44a). Where the right-of-way statute created the duty of care on the part of the BN toward the Crow tribal members, BN's claim that there is no connection between the operation of the train and the Crow tribal members is nonsensical. Of course, no such duty of care was created by the right-of-way grant in *A-1 Contractors*.

In *South Dakota v. Bourland*, 508 U.S. __, 124 L. Ed. 2d 606, 113 S. Ct. 2309 (1993), *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Yakima Nation*, 492 U.S. 408 (1989) and *Strate v. A-1 Contractors, supra*, the Indian Tribes had conveyed title to the land to third parties, or, as in *Montana*, never held title to the bed of the Big Horn River. Furthermore, the lands in those cases, title of which was not held by the Tribes, was open to the public. In the case at bar, the Crow Tribe has maintained, at all times, the title to the land encompassing the right-of-way. In *Soldana*, this Court said:

> To have excepted this strip from the reservation would have divided it into two; and would have rendered it much more difficult, if not impossible, to afford that protection to the Indians which the provisions quoted were designed to insure.

Id. at 533.

In *Strate v. A-1 Contractors*, this Court held: "We 'can readily agree,' in accord with *Montana*, 450 U.S. at 557, that tribes retain considerable control over nonmember conduct *on tribal land*." 117 S. Ct. 1413 (emphasis added). Since the Crow Tribe owned the land in the case at bar, BN's reliance on this Court's decisions dealing "with land alienated to non-Indians" is inapposite and non-controlling. The Crow Tribal Court had jurisdiction over the conduct of BN on the land owned by the Tribe.

If, somehow, the Crow Court of Appeals or a Federal Court were to rule that this accident occurred on a BN right-of-way which was the equivalent of "alienated, non-Indian land", in disregard of the Crows' ownership, the Crows' ability to tax, the facts concerning the character and ownership of the intersecting road, and the Congressional Act requiring BN to operate its railroad with due regard to the rights of the Crow Indians, the *Montana* exceptions would nevertheless create jurisdiction in the Crow Tribal Court.

The first Montana exception covers "activities of non-members who enter consensual relationships with the tribes or its members through commercial dealings, contracts, leases, or other arrangements." Here, the Congressional grant of the right-of-way to BN across Crow land, reserving title to the land within the right-of-way to the Crow Tribe, specifically created a duty

of safety so as not to harm or kill Crows. If BN and its predecessors refused to give such due regard to the rights of the Indians, which sadly has been the case over the years, the Crow Indians obviously have jurisdiction to fashion a remedy.

Furthermore, the statute provided that "the President of the United States may, in his discretion, require that the consent of the Indians to said right of way shall be obtained by said railroad company, in such manner as he may prescribe, before any right under this act shall accrue to said company." (Pet. App. p. 44a.) Even if the Congressional statute were not at least a "consensual relationship" with the Crow Tribe, the railroads entered into a specific written agreement with the Crow Tribe before the right-of-way was ever granted by Congress. A copy of this written agreement is included in the record before the Crow Court, but is not before this Court.

The dispute in this case, arising out of this federal statute granting the right-of-way, is distinctly tribal in nature, as compared to "non-tribal in nature" as found in *A-1 Contractors*. Red Wolf's decedents were members of the Tribe. Over the last ten years preceding the deaths of Red Wolf's decedents, as many as 25 other members of the Crow Tribe were killed by BN on the reservation. This situation can hardly be characterized as a "run-of-the-mill" [highway] accident. 117 S. Ct. 1415. Under these circumstances, the Crow Tribal Court of Appeals certainly has the obligation and the right to determine whether the *Montana* exception of "consensual relationships" creates subject matter jurisdiction for the Crow Tribal Court.

The facts in this case also meet the second exception to the *Montana* general rule because BN's conduct over the last decade, whereby it has caused the death of at least 25 tribal members, where BN failed to operate its railroad operations with due regard for the rights of Crow Indians, has threatened the "health or

welfare of the Tribe". The very reason voir dire was cumbersome in the Crow Tribal Trial Court was that so many Crow tribal members had been killed by BN in recent years. Many prospective jurors agreed they could not be fair because of the death of a loved tribal member and hence did not sit. The number of deaths was simply overwhelming.

Where: (1) the Tribe owned the land; (2) the Tribe had the right to tax BN's railroad operation; (3) BN had the congressionally mandated duty to give due regard to the rights of tribal members; and (4) BN had killed 25 tribal members in recent years by breaching the congressional statute, it is difficult to imagine a greater threat to the health and welfare of the Crow Tribe than the conduct of BN. Not only did the actions of BN directly affect the health and welfare of the Tribe, but the political integrity and economic security of the Tribe and its members as well.

BN argues that there can be no jurisdiction in the Tribal Court for a civil tort remedy in the event of personal injury or death on a reservation where the alleged tort feasor is a non-Indian. This Court has never so ruled and certainly did not so rule in *A-1 Contractors*. BN, in its petition for writ of *certiorari*, is asking this Court to make a disastrously wide-sweeping change in the area of tort litigation in Tribal Courts, with an incomplete record, *before* the Crow Tribal Court of Appeals has had an opportunity to rule.

BN asks this Court to grant its petition for writ of *certiorari* when the Ninth Circuit specifically found that BN failed to exhaust its Tribal Court remedies and when the Federal District Court acknowledged BN had not so exhausted those remedies. (Pet. App. pp. 5a, 6a, 7a). BN's position is that this Court should overrule its decisions in *National Farmers Union Insurance Co. v. Crow Tribe*, and *Iowa Mutual Insurance Co. v. LaPlante*, where

this Court repeatedly held that the Tribal Court must have the first opportunity to determine jurisdiction which will, in turn, allow a full record to be developed in the Tribal Court so that appropriate federal review can follow. In order to accomplish these goals, it is mandatory that the Federal Court "stay its hand" to give the Tribal Court the opportunity to determine the existence of jurisdiction.

The Ninth Circuit panel, when BN sought an *en banc* rehearing, and after no judge of the Ninth Circuit even requested a vote on the suggestion for rehearing *en banc*, relied on *National Farmers* and *LaPlante*, determined that exhaustion of tribal court remedies was mandatory, and ordered that the permanent injunction issued by the Federal District Court be dissolved and that the Federal District Court abstain. The Ninth Circuit was correct in its ruling.

Tribal jurisdiction over the subject railroad deaths was not changed by the *A-1 Contractors* case. At the very least, the tribal court jurisdiction question needs to be determined by the Crow Court of Appeals in the first instance, in light of *A-1 Contractors*, before any Federal Court involvement. The Crow Court of Appeals has ordered the parties in their appellate briefs to address *Strate v. A-1 Contractors* on the issue of subject matter jurisdiction. The Crow Appellate Court also stated: "The parties may supplement the record with copies of such public records as they believe are relevant to the jurisdictional inquiry, including but not limited to treaties, statutes, Tribal ordinances, and right-of-way documents." The Crow Court of Appeals is obviously in the process of making a determination of Tribal Court jurisdiction at this time. (Red Wolf App. p. 33a).

The Ninth Circuit's decision was correct and BN's petition for *certiorari* should be denied. Furthermore, it would be highly inappropriate for this Court to enter a GVR order in light of the

BN's failure to exhaust tribal remedies and the abstention doctrine mandating the Federal Court to "stay its hand".

III.

BN'S PETITION CREATES THE "PROCEDURAL NIGHTMARE" ENVISIONED BY THIS COURT IN *NATIONAL FARMERS*.

BN's petitioning this Court for a writ of *certiorari* asking this Court to determine there is no Tribal Court jurisdiction in this case, when this precise issue is pending before the Crow Court of Appeals, creates a serious problem. A lengthy record exists in the Crow Tribal Court system, which record *is not and was not* before the Federal District Court, the Ninth Circuit, or this Court. It would be all but impossible for the Federal District Court, the Ninth Circuit, or this Court to rule on the jurisdictional issue without the benefit of this entire record.

Query: Does the Crow Tribe tax BN for the right-of-way? Query: Is the road which intersects the railroad right-of-way where the accident occurred a tribal road, a county road or a private road? Query: What was, or, better stated, what will be, the basis for the Crow Tribal Court of Appeals determining the existence of or denying the existence of subject matter jurisdiction?

On page 16 of its petition, BN states: "After the decision in *A-1 Contractors*, the lack of tribal court jurisdiction over the *Red Wolf* case could not be clearer." Therefore, BN asks this Court [or a lower Federal Court pursuant to a GVR order] to determine whether or not Tribal Court subject matter jurisdiction exists, after the Crow Tribal Trial Court has determined jurisdiction does exist, *but before* the Crow Tribal Court of Appeals has had an opportunity to rule on the issue. It is difficult

to envision a greater violation of the mandatory exhaustion rule of *National Farmers* and *LaPlante*, or more interference with the Tribal Court's judicial system, than is being urged by BN.

BN has attempted to attack the Crow Tribal Court because of the manner in which it handled the jury trial of *Red Wolf v. BN*, claiming its rights to due process and equal protection were violated. BN contends that the jurors were friends and relatives of Red Wolf. These very issues are discussed at length by BN in Red Wolf's brief to the Crow Tribal Court of Appeals. [This brief is *not* a part of the record in this case.] Red Wolf has already answered all the concerns raised by BN before the Crow Court of Appeals. Also, BN sued the Crow Tribal Court Judge, the Honorable Ronald Arneson, in Federal Court *before* the Tribal Court of Appeals had an opportunity to rule on the appeal issues. BN is asking this Court to grant a writ of *certiorari* when, to do so, would cause even more interference with the Crow Tribal Court system than has already been caused.

BN has further attacked the Crow Tribal Court, claiming that the Crow Judge, Donald Stewart, exhorted the jurors to take action against BN, speaking in the Crow language. BN has chosen to advise this Court of BN's slanted version of Judge Stewart's statement in Crow, *without advising this Court that the Crow Court of Appeals has already made a procedural ruling on how this Crow language interpretation will be handled on appeal.* In this regard, Judge William C. Watt of the Crow Court of Appeals, stated:

> Appellant's request to transmit the record has raised the question of whether the video and audio tapes of the trial are "transcripts" within the meaning of Rule 7, and if so, how they may be duplicated and cited on appeal. *The accuracy of any translations from the*

> *Crow language may also become an issue.* One purpose of this order is to establish a process at the outset of these proceedings for resolving any questions concerning the record on appeal.

(Red Wolf App. p. 2a) (emphasis added).

On page 19 of its petition, BN finds fault with the Crow Court of Appeals in not having already ruled on the issue of subject matter jurisdiction. BN's interference with the Crow Tribal Court jurisdiction has been so extreme that it has forced the *Crow Court of Appeals to abstain*. The Crow Court of Appeals stated: "Based on principals of comity, the trial court should stay all proceedings to actually execute on the judgment and any requirement for actually posting security during the pendency of any restraining orders issued by the U.S. District Court." Arneson ER, p.123. In light of this interference by BN with the Crow Tribal Courts, it is strained for BN to complain about any delay.

The BN's refusal to accept the Ninth Circuit's correct decision requiring exhaustion of tribal court remedies and BN's petition for a writ of *certiorari* have created the precise "procedural nightmare" envisioned by this Court in *National Farmers* which created the rule mandating exhaustion of tribal court remedies. The granting of BN's petition would simply cause further disruption of the tribal court remedies which the parties are currently attempting to exhaust. Under these circumstances, the granting of BN's petition for writ of *certiorari* would be inappropriate.

BN'S MISSTATEMENTS OF FACT AND LAW

BN has made serious misstatements of fact and law in its continuing interference with the Tribal Court process and in its attempt to have the Ninth Circuit opinion set aside. Rule 15 of the Supreme Court rules admonishes the parties to point out misstatements at an early juncture. Several of BN's misstatements have already been discussed above. Other misstatements made by BN are as follows:

BN claims it is facing a $250 million judgment when it knows, and the Ninth Circuit specifically noted, that the judgment will be reduced to $25 million, as will the bond, plus interest. The Crow Court of Appeals has remanded the case to the Crow Tribal Court for the very purpose of amending the judgment to $25 million and reducing the bond accordingly. (Red Wolf App. pp. 2a-3a and 30a-33a).

BN states it will be severely prejudiced by the Ninth Circuit's ruling that it must file the $25 million bond in accordance with the Tribal Court's order. Red Wolf, to avoid any prejudice, entered into a stipulation. The Ninth Circuit accepted that stipulation and said:

> The judgment creditors here agreed to condition the supersedeas bond upon completion of all available federal review. Regardless of the extent of review available, it may not be said that there is inadequate opportunity to challenge the Court's jurisdiction when, as here, *the federal review of Tribal Court jurisdiction is assured.*

(Pet. App. pp. 8a-9a) (emphasis added).

Finally, BN has misrepresented to this Court what it claims to be injustices it has suffered. Red Wolf has responded in the appropriate Tribal Court to each of BN's alleged claims. Of course, it would be inappropriate for Red Wolf to comment at this time on BN's claimed alleged errors, which are pending before the Tribal Court because the record before this Court is far from complete, whereas the record before the Tribal Court is complete.

CONCLUSION

BN's application for writ of *certiorari* should be denied. The Tribal Court exhaustion rule mandates abstention by the Federal Courts until such time as the Tribal Court has had an opportunity to, on a full record, make all the appropriate determinations. At that time, and at that time only, may the Federal Court become involved. This rule of abstention is mandatory unless the specific exceptions set forth in *National Farmers* are met. No such exception has been met in this case and abstention is mandatory.

Furthermore, the decision of this Court in *A-1 Contractors* is certainly not controlling in the case at bar, all as discussed above. The Crow Tribal Court of Appeals must make its determination as to whether or not subject matter jurisdiction exists based on all the controlling law, including this Court's recent decision in *A-1 Contractors*. Under no circumstances should the federal court system become involved in ruling on this jurisdictional issue when, on the basis of "comity", the Federal Courts must abstain until the Tribal Court has had a full opportunity to rule on the issues.

Respectfully submitted,

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APPENDIX A — ORDER GOVERNING CONDUCT OF APPEAL IN THE CROW COURT OF APPEALS, IN AND FOR THE CROW INDIAN RESERVATION, CROW AGENCY, MONTANA FILED FEBRUARY 7, 1997

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 97-010

ESTATES OF RED WOLF and BULL TAIL,

Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellant.

ORDER GOVERNING CONDUCT OF APPEAL

Burlington Northern Railroad Company ("BN") filed a notice of appeal on January 8, 1997, from the judgment of the Tribal Court entered against BN on February 6, 1996, in the total amount of $250 million. BN also appeals from all prior Tribal Court orders and rulings, and from the Tribal Court's order of December 30, 1996, denying BN's motion for judgment n.o.v. or for a new trial. For the reasons stated in this court's Order in Civ. App. Docket No. 94-31 filed April 24, 1996, BN's notice of appeal was timely filed.

A. *The Record on Appeal.* In furtherance of its duties under

Appendix A

Rule 8 of the Crow Rules of Appellate Procedure, BN has requested the Clerk's office to ensure that the record on appeal is timely transmitted to the Court of Appeals, and has offered such assistance as may be required.

Due to the size of the record is in this case, the Clerk's office has not been able to complete the assembly and duplication of the record within the time allowed by the Rule. Appellant's request to transmit the record has raised the question of whether the video and audio tapes of the trial are "transcripts" within the meaning of Rule 7, and if so, how they may be duplicated and cited on appeal. The accuracy of any translations from the Crow language may also become an issue. One purpose of this Order is to establish a process at the outset of these proceedings for resolving any questions concerning the record on appeal.

B. Plaintiffs' Notice and Request. On January 28, 1997, the plaintiffs, through their counsel, filed a "Notice and Request" with the Court of Appeals requesting us to enter an amended order reducing the total amount of the judgment to $25 million ($5 million per heir rather than $50 million).[1] Plaintiffs also requested this court to require a supersedeas bond in the amount of $30 million, including post-judgment interest, on the condition that BN need not actually post the bond in the Tribal Court until BN "receives whatever federal review it properly seeks and is entitled to."

In procedural matters, the Crow Tribal courts seek guidance

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1. The timing of plaintiffs' request to reduce the judgment compels me to comment. Due respect for the weightiness of the trial judge's deliberations would normally dictate filing such a request with the Tribal Court, if at all possible, *before* its decision on the defendant's post-trial motion, which in this case was pending for more than 8 months.

from the federal rules. The filing of a notice of appeal generally divests the trial court of jurisdiction over the matters appealed from. *See, e.g., Smith v. Lujan,* 588 F.2d 1304, 1307-8 (9th Cir. 1979). This principle is a judge-made doctrine "designed to avoid the confusion and inefficiency that might flow from putting the same issue before two courts at the same time." 9 *Moore's Federal Practice* § 203.11 at 3-50 (2d ed., 1996). The procedure should avoid "endless paper shuffling" between the trial and appellate courts. *Id.; Kern Oil & Refining Co. v. Tenneco Oil Co.,* 840 F.2d 730, 734 (9th Cir. 1988). The main exceptions to the rule do not apply in this case because the motion was filed more than 10 days after the Tribal Court's order denying BN's post-trial motion. *See* Fed. R. App. P. 4(a)(4).

This court must therefore assume jurisdiction of plaintiffs' request to reduce the judgment. However, it seems problematic for this court to review a judgment it has entered, and it is uncertain whether we have the formal power to directly enter or amend a final judgment in any event. Accordingly, we will treat plaintiffs' request as a motion to remand to the Tribal Court for the limited purpose of entering an amended judgment as requested by plaintiffs. *See, e.g., Smith v. Lujan, supra,* 558 F.2d at 1307.

The court intends to grant plaintiffs' motion as a matter of right. The amendment would be effective retroactively to the date of entry of the original judgment. The proceedings on remand would presumably be limited to satisfactory affirmation, by affidavit or personal appearance, that the individual heirs or their legal guardians knowingly consent to reduce the judgments. The remand for this limited purpose will therefore probably not delay proceedings in this appeal. However, before fashioning that order, the court requests the parties' further comments on

how the amendment may affect this appeal, including the reasonableness of the judgment if that should be an issue on appeal, or whether it should be conditioned in any way to avoid prejudice to the defendant.

C. The Supersedeas Bond. BN has previously applied to the Tribal Court for a stay of execution of the judgment. In the previous proceedings before the Tribal Court, BN declined to post any bond or propose any alternative security arrangements. This court's assumption of jurisdiction over matters related to the stay and supersedeas bond is thus consistent with sound judicial policy and federal appellate practice. *See, e.g.*, Fed. R. Civ. P. 62(g); Fed. R. App. P. 8(a).

This court takes judicial notice that the United States Court of Appeals for the Ninth Circuit has issued an opinion in *Burlington Northern Railroad Company v. Red Wolf*, No. 96-35254 (9th Cir., Jan. 29, 1997), requiring the defendant to exhaust its Tribal court remedies before seeking a stay in the U.S. District Court. This court recognizes that defendants may seek further review of the bond issue with the Ninth Circuit and/or the Supreme Court, and understands that plaintiffs' motion to require a $30 million bond is intended to accommodate BN's federal court review rights.

In the meantime, provided that defendant files a proper motion in this court to stay execution of the amended judgment, this court intends to issue an order regarding the supersedeas bond required as a condition of the stay pursuant to Crow R. Civ. P. 18(b) after considering both parties' positions on the form and amount of the bond as expressed in the procedural briefing ordered herein.

Appendix A

In view of the requirements of time, and consistent with federal appellate practice (*see, e.g.*, Fed. R. App. P. 8(b) and 27(c); Ninth Circuit Rule 27-1(1)), this interim procedural order is issued by a single judge of the Court of Appeals. Now, therefore,

IT IS HEREBY ORDERED:

1. That the parties shall brief any or all of the foregoing issues, and such other procedural issues as the parties may deem necessary at this time, according to the following schedule:

(a) Appellant's brief or statement and supporting materials shall be filed on or before February 24, 1997, together with any motion for stay of execution and proposed security for the amended judgment; and

(b) Appellee's response shall be filed within 14 calendar days after receipt of appellant's brief.

The parties' procedural briefs shall be supported by copies of such portions of the record or by other materials as are necessary to determine the issues raised. The number of briefs and service requirement shall conform to Crow R. App. P. 9; counsel are requested to mail one of the copies of their briefs and supporting materials to the undersigned at 310 West Spruce, Missoula, MT 59802.

IT IS FURTHER ORDERED that:

2. All proceedings to enforce or execute on the judgment are STAYED until the defendant has exhausted or waived its

rights to seek federal court review of the requirement to post bond in the Tribal Court as a condition of obtaining a stay of execution pending this appeal;

3. Any further stay of execution shall be conditioned upon defendant filing a motion requesting the stay and posting security for the amended judgment as approved by further order of this court.

IT IS FURTHER ORDERED that:

4. The official caption of this appeal and the docket number shall be as they appear in the caption of this order.

5. The schedules for transmitting the record and filing briefs under Rules 8 and 10 of the Crow Rules of Appellate Procedure are VACATED, and those schedules shall be governed by order of the court, including this order.

6. Unless otherwise agreed by the parties and/or ordered by this court after the procedural briefing:

> (a) The record on appeal shall consist of the items listed in Crow R. App. P. 7(a). Unless otherwise ordered after the procedural briefing, the transcripts of the Tribal Court proceedings shall be in written form only;
>
> (b) Transcripts of any proceedings or statements in the Crow language shall include translations into English certified by the translator, and any disputes involving translations shall be addressed to this court as part of the procedural briefing provided for herein.

(c) The costs of transcripts, certified translations, and of duplicating one complete copy of the record pursuant to Crow R. App. P. 8(a) and (b) shall be paid by appellant upon its receipt of the Clerk of the Tribal Court's statement;

(d) The record on appeal shall be transmitted to the Court of Appeals promptly after the court's further orders following the procedural briefing (as specified therein), and upon receipt of the record, the Clerk of the Court of Appeals shall issue a Notice of Transmission of the Record to all parties;

(e) Appellant's principal brief on appeal shall be filed within thirty (30) calendar days following the date of the notice of transmission of the record;

(f) Appellees' response brief shall be filed within twenty-five (25) days after receipt of appellant's brief;

(g) Appellant shall be permitted to file a reply brief within ten (10) days after receipt of appellees' brief;

(h) The form of the parties' briefs on the merits should conform generally to Ninth Circuit Rules 28-1 and 28-2 as applicable, except that the maximum length shall be as provided in Fed. R. Civ. P. 28(g), and references to the record shall be made to page numbers of the Excerpts of the Record;

(i) The parties shall file with their briefs paginated "Excerpts of the Record" in conformance with Ninth Circuit Rule 30-1, except that the number of copies filed

shall be the same as the number of briefs specified in Crow R. App. P. 9(a); and

(j) All motions for extension of time must be supported by a sworn affidavit and state opposing counsel's position regarding the extension. Objections to any of the above procedures must be raised in the parties' procedural briefs. The parties are encouraged to enter into stipulations with respect to any procedural matter, and should file any such stipulations along with a form of order. In the meantime, should the Clerk of the Tribal Court require any assistance in assembling or duplicating the record, she should contact appellant's counsel.

DATED this 6th day of February, 1997

s/ William C. Watt
William C. Watt, Judge
Crow Court of Appeals

APPENDIX B — OPINION AND ORDER OF THE CROW COURT OF APPEALS FOR THE CROW INDIAN RESERVATION, CROW AGENCY, MONTANA FILED FEBRUARY 21, 1996

CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 94-31

ESTATES OF RED WOLF, and BULL TAIL,

Plaintiffs/Respondents,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant/Appellant.

OPINION & ORDER

Defendant Burlington Northern Railroad Company (the "Railroad") appeals from the February 9, 1996 Order of the Crow Tribal Court (Arneson, J.), denying the Railroad's motion for stay of execution on the $250 million judgment entered against it on February 6, requiring the Railroad to post a supersedeas bond pursuant to Crow. R. Civ. P. 18(b), and setting a hearing for approval of the Railroad's proposed bond for February 20, 1996. In addition, Railroad applies to this Court for a stay of the judgment and a waiver of the requirement to post a surety bond pursuant to the guidance provided by Fed. R. App. P. 8(a).

Appendix B

Shortly after filing this appeal and application on February 12, the Railroad also filed an action in the U.S. District Court for the District of Montana, Cause No. CV 96-17-BLG-JDS. That Court on February 15, 1996, granted a Temporary Restraining Order enjoining Judge Arneson and the plaintiffs from enforcing the judgment and ordering them to appear for a hearing on a permanent injunction on February 26, 1996. This is the second federal court TRO enjoining the conduct of Judge Arneson's duties since the beginning of the year issued upon the application of a litigant that was also pursuing its appellate review rights in this Court. *See Big Horn County Electric Cooperative, Inc. v. Adams, et al.*, Cause No. CV 95-194-BLG-JDS (TRO issued January 3, 1996; case dismissed February 15, 1996).

In support of its appeal and application, the Railroad argues that this case presents important questions of Tribal tort law, and under the Indian Civil Rights Act, (25 U.S.C. § 1302 *et seq.*), which should be briefed and decided "without the distraction of collateral enforcement litigation." The Railroad also argues that a bond is not warranted because of its obvious ability to pay the judgment, as evidenced by the financial statements attached to the Affidavit of Gary L. Crosby which was presented to the Tribal Court. Mr. Crosby is the Vice-President — Litigation for Burlington Northern Santa Fe Corporation, which owns Burlington Northern Inc., which in turn owns Burlington Northern Railroad Company and its subsidiaries. According to the Form 10Q filed with the Securities Exchange Commission for the period ending September 30, 1995, the Railroad had net assets of $3.36 billion and year-to-date revenues of $4 billion and net income of $431 million. Crosby Aff. Exh. B. The Railroad rests its primary contention on the "well-settled" principle in the federal system that requiring

it to post a bond in these circumstances amounts to an abuse of discretion by the lower court.

The plaintiffs filed an opposition to the Railroad's application on February 15, pointing out that it was premature because no notice of appeal had been filed, and that Railroad has not made a showing of its inability to obtain a bond. Plaintiffs urge this Court defer to the Tribal Court's discretion in this matter and acquire the Railroad to post a bond to ensure payment of the judgment.

This application also constitutes the third time the Railroad has sought interlocutory relief in this Court since January 3, 1996. Prior to this application, its concurring appeal of the Tribal Court's denial of Bonnie Little Nest's motion to intervene was dismissed as untimely; and its motion for emergency stay of proceedings, appealing several of the Tribal Court's pre-trial rulings, was dismissed on January 29, 1996, for lack of appellate jurisdiction over a final order or judgment. This application, too, must be denied as premature.

As a threshold matter, the Crow Rules of Appellate Procedure do not contain a rule expressly authorizing the Court of Appeals to stay a judgment or approve a supersedeas bond, as does Fed. R. App. P. 8(a). We approve the policy embodied in Rule 8, and followed by the judgment debtor here, of seeking relief in the first instance in the Tribal Court. We have also followed the provision in Fed. R. App. P. 8(a) allowing consideration of this application by a single judge of the Court of Appeals in these exceptional circumstances. In the case of a final judgment which is the *subject of a pending appeal* before this Court, the Tribal Court's *final orders* relating to stay of the judgment, and to the bond or other security given as a condition

of the stay, are final orders subject to review by the Court of Appeals for abuse of discretion pursuant to Crow Tribal Code § 3-1-103(2) and Crow R. App. P. 1 and 3(a).

In this case, the judgment was not the subject of a pending appeal when the applications for stay were filed with the Tribal Court or this Court, or when the U.S. District Court issued its TRO at the Railroad's request. The provisions for staying the judgment and posting bond in Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8 presuppose the existence of a valid appeal. 9 *Moore's Federal Practice* ¶ 208.06 at 8-16 (2d ed. 1995), *citing Century Laminating Ltd. v. Montgomery*, 595 F. 2d 563 (10th Cir. 1979). The Railroad has since tendered a notice of appeal dated February 16, 1996, which the Clerk duly filed on February 20.

Assuming the existence of a valid appeal, the Tribal Court's order lacks finality because the Tribal Court has not yet had the opportunity to exercise its discretion in approving a specific bond or in setting its amount. Moreover, the Railroad has not yet offered any evidence concerning the cost of a bond or its inability to obtain a bond of this size, nor has it proposed other forms or combinations of security for the Tribal Court's consideration. Even under the federal rules, "Rule 8 may not be used as a means of appealing a determination by the district court pursuant to Civil Rule 62, to which the appeals court will defer absent an abuse of discretion." 9 *Moore's Federal Practice* ¶ 208.04 at 8-13 (2d ed. 1995-96 Supp.). "We shall not use Rule 8 to undermine the district judge's discretion." *Lightfoot v. Walker*, 797 F. 2d 505, 507 (7th Cir. 1986). Adhering to this wise principle, the Court declines to review the Tribal Court's Order dated February 9, or to consider the Railroad's application for stay and waiver of bond until after the Tribal Court has

entered final orders concerning the specific security required as a condition of a stay of the judgment.

Although we decline to review the Tribal Court's order at this time, because of the unusual size of the judgment and both parties' important interests in promptly resolving these issues, we provide general guidance in this opinion for the Tribal Court's further deliberations with respect to requiring security for the judgment during the pendency of the appeal.

As the Tribal Court noted, Rule 18(b) of the Crow Rules of Civil Procedure by its terms requires an appellant to post surety bond on or before the date of filing an appeal as a condition for obtaining a stay of execution of the judgment. In federal practice, too, posting a supersedeas bond in the amount of the judgment, plus interest, costs on appeal, and damages for the delay, is the normal requirement. *Poplar Grove, Etc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979) (reversing the district court's requirement for a $10,000 bond on a $270,000 judgment and remanding to "establish some type of positive protection of the judgment creditor's rights" or to vacate the reduced bond). The purpose of the bond is to protect the non-appealing party against any loss sustained as a result of having to forego execution of the judgment pending the appeal. *Id.* It also allows the judgment creditor to "avoid the risk of satisfying the judgment only to find that restitution is impossible after reversal on appeal." *Id.* Thus, the ability to post a bond is a "privilege extended the judgment debtor," who in turn bears the burden to objectively demonstrate the reasons for departing from the requirement for a full security bond. *Id. See also, International Wood Processors v. Powder Dry, Inc.*, 102 F.R.D. 212 (D.S.C. 1984) (requiring $2.8 million bond for amount of judgment when appellant did not present financial information and most assets were located outside the district).

Appendix B

The federal courts have exercised discretion in reducing the amount of the bond, or providing for other forms of security, when circumstances warrant. See 9 *Moore's Federal Practice* ¶ 28.06[2] at 8-18. In *Poplar Grove*, the Fifth Circuit provided the following direction to the district court on remand:

> If a judgment debtor objectively demonstrates a present financial ability to facilely respond to a money judgment and presents to the court a financially secure plan for maintaining that same degree of solvency during the period of an appeal, the court may then exercise a discretion to substitute some form of guaranty of judgment responsibility for the usual supersedeas bond. Contrariwise, if the judgment debtor's present financial condition is such that the posting of a full bond would impose an undue financial burden, the court similarly is free to exercise a discretion to fashion some other arrangement for substitute security through an appropriate restraint on the judgment debtor's financial dealings which would furnish equal protection to the judgment creditor.

Poplar Grove, supra, 600 F.2d at 1191. Under this guidance from the Fifth Circuit, the judgment creditor is entitled to some effective form of security even if the district court decides to waive the requirement for a bond.

Other federal courts have waived the bond for solvent defendants in certain circumstances without requiring security.

Appendix B

In *Federal Prescriptive Service v. American Pharmaceutical Assn.*, 636 F.2d 755, 760-61 (D.C. Cir. 1980), the court construed Fed. R. Civ. P. 62(g) and Fed. R. App. P. 8(a) to authorize an unsecured stay of a $102,000 judgment when (1) both parties were appealing on the merits, (2) the judgment debtor's net worth of $4.8 million was about 47 times the amount of the judgment, and (3) the judgment debtor was a long-time District resident. As noted above, the Crow Tribal Code does not contain similar provisions to the federal rules relied on in that case.

The Seventh Circuit has developed a five-part test for waiving the bond requirement. See *Dillon v. City of Chicago*, 866 F.2d 902, 904-905 (7th Cir. 1988). (The Tribal Court considered this test in reaching its February 9 Order requiring a bond.) The court in *Dillon* reversed the district court's requirement to transfer funds to the Clerk of Court in the full amount of the $115,360 employment discrimination judgment against the City of Chicago, having been persuaded that the City's previously appropriated $454 million payroll fund together with procedures which would normally ensure payment of the judgment within 30 days were sufficient security without the need for posting a bond. *Id.* at 905.

In another case arising in the Seventh Circuit, the district court in *In re Oil Spill by the Amoco Cadiz*, 744 F. Supp. 848, 850 (N.D. Ill. 1990), waived the bond requirement for Amoco and the Republic of France. With respect to Amoco, the court based its waiver on the evidence that Amoco's quarterly net income was 3 times the amount of the judgment, and many of its assets were located within the United States. The court also noted that Amoco promised to file quarterly reports to assure the court of its continued ability to respond to the judgment.

Id. at 850 n. 2. With respect to France, the court observed that bond was not necessary on the $35 million judgment in favor of Amoco, because France also had a $100 million judgment against Amoco that could be used to offset its liability. *Id.* In contrast, the court required the other judgment debtor, Astilleros Expanole, to post a bond because it had no assets within reach of the federal court, and had consistently refused to recognize the court's jurisdiction during the course of proceedings in that case. *Id.* at 850-51. This latter holding was relied upon by the Tribal Court in its February 9 order.

In other cases involving judgment debtors with large assets, the Seventh Circuit has insisted on a bond or other adequate security. In *Lightfoot v. Walker*, 797 F.2d 505, 506 (7th Cir. 1986), the court required the State of Illinois to post a full bond on a $710,501 attorneys' fee judgment when the procedure for collecting a judgment against the state was cumbersome, time-consuming and uncertain, since it could not be paid until the legislature appropriated the funds. The court also observed that the only offsetting concern was the cost of the bond, usually one percent or $7,000, which was only "a modest amount." *Id.* at 507.

In *Olympia Equipment v. Western Union Telegraph Co.*, 786 F.2d 794 (7th Cir. 1986), Judge Posner, writing for the court, affirmed the district court's waiver of bond on a $36 million judgment against Western Union when the district court provided for adequate alternate security arrangements. Western Union Telegraph, the principal subsidiary of Western Union Company (similar to the relationship between the Railroad and Burlington Northern Inc. in this case), had total assets worth $2 billion, but was financially distressed and illiquid, and claimed it was unable to obtain a bond. *Id.* at 796. The alternate

security arrangements consisted of pledges of (1) $10 million in cash, (2) $10 million in accounts receivable, and (3) a security interest in some of the company's physical assets purportedly worth $70 million. *Id.* Before turning to the fundamental issue of the adequacy of the alternate security, the Court of Appeals questioned the company's inability to obtain a bond if it had offered to pay more than the customary 1% fee, and likewise questioned the parties' failure to explore the possibility of a partial bond that would secure only the compensatory damages portion of the judgment (e.g., $12 million). *Id.* at 797. The court then noted a more serious problem with the district court allowing the telegraph company to transfer cash to its parent, who ordinarily would not be liable to the judgment creditor. *Id.* at 798. In light of a pending sale of a division of the telegraph company, the court modified the district court's order and forbid any cash transfers to the parent unless the parent agreed to be bound on the judgment to the extent of the transfers (or the parent posted its own bond in this regard). *Id.* at 799.

In a case involving one of the largest federal court judgments in its time, the U.S. District Court for the Southern District of New York in 1970 allowed alternate security as a condition for staying TWA's $145 million antitrust default judgment against Hughes Tool Co. *See Trans World Airlines, Inc. v. Hughes*, 515 F. 2d 173, 175 (2d Cir. 1975). The course of the proceedings to determine the form of security may be instructive in this case. In *Hughes*, the court held a "number of hearings at which TWA and Toolco [Hughes] expressed their diametrically opposed positions with respect to the need for a bond to protect the judgment pending appeal." *Id.* at 176. Hughes, with a $500 million net worth, argued against any bond, and offered instead to create a lien on specific property valued at $45 million (the

amount of the compensatory damages). *Id.* TWA insisted upon a bond in the full amount of $161 million as provided by the local rules. *Id.* at 176-177. After concluding that posting the full supersedeas bond was not practicable under the circumstances, the district court allowed alternate security arrangements in the form of (1) a $75 million letter of credit in favor of TWA (in lieu of a bond), and (2) the $86 million balance secured by Hughes' commitment to maintain Toolco's net worth at three times that amount (or $335 million). *Id.* at 177. Compliance with this latter commitment would be certified by quarterly audited balance sheets. *Id.* At the court's direction, and "[a]fter the usual sparring," the parties came up with the details of this alternate security arrangement. *Id.*

The Second Circuit's decision in *Trans World Airlines v. Hughes, supra*, stands for the proposition that it is not always to the Appellees' advantage to insist on a large bond regardless of Appellant's cost. *See also*, 9 *Moore's Federal Practice* ¶ 208.06[2] at 18-19. After the Hughes defendants obtained a reversal by the U.S. Supreme Court, the district court awarded as costs on appeal, pursuant to Fed. R. Civ. P. 39(a) and (e), the $1,015,625 fee incurred by the Hughes defendants for the $75 million letter of credit (at one-half percent per annum). *Hughes* 515 F. 2d at 175. On appeal, the Second Circuit also allowed as costs taxable against TWA the $617,765 charges incurred for the quarterly audits, because they represented a cost effective substitute security for the $86 million balance secured by the company's net forth, and this alternative was cheaper than the premium for a supersedeas bond or the fee for a letter of credit. *Id.* at 177-78. Although we are not called upon here to speculate as to the possibility of a discretionary award of costs on appeal under Crow R. App. P. 15 if the judgment is reversed or modified, it is worth noting that plaintiffs/appellees in this case

bear some degree of exposure to liability for reimbursing some of the Railroad's costs of providing adequate security for the judgment.

Finally, the federal courts' treatment of security for Pennzoil's $11.1 billion judgment against Texaco awarded by the state district court in Houston, Texas, bears mentioning. *See Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1, 4 (1987). In that case, even before the Texas court's judgment was entered, Texaco filed a separate action in the U.S. District Court for the Southern District of New York to enjoin enforcement of the judgment. *Id.* at 6 n. 5. Texaco argued that the apparently mandatory bond requirements of Texas law, together with other rights of a Texas judgment creditor, violated various federal statutes and its constitutional rights. *Id.* at 6. The district court accepted jurisdiction and granted a preliminary injunction, but conditioned the injunction on Texaco's posting *a bond in the amount of $1 billion. Id.* at 8 n. 7. Thus, although it only partially secured the judgment, a bond of this size was authorized by a federal district court even when it found that Texaco's appeal had a reasonable probability of success, *id.* at 8, and Texaco's assets were admittedly sufficient to satisfy the judgment without liens or a bond, *id.* at 19-20 (Breenan, J., concurring). The Second Circuit subsequently affirmed, but the Supreme Court reversed, holding that the federal courts should have deferred to the interests of allowing state courts to enforce their own judgments, based on principles of comity. *Id.* at 17.

Applying these teachings to the facts developed thus far in the instant case, we find that it is not at all "well settled" that the Railroad would be entitled to a waiver of the supersedeas bond under federal law. The Railroad's reported net assets as of September, 1995, were to 13 times the amount of the judgment.

Crosby Aff. Exh. B ($3.36 billion divided by $250 million). Its average quarterly net income during 1995 was less than 60% of the amount of the judgment, and the $29 million in cash and cash equivalents reported on its balance sheet represents less than 12% of the amount of the judgment. *Id.* These ratios are substantially less than the ones involved in *Federal Prescriptive Service* (net assets of 47 times the judgment), *Dillon* ($454 million payroll fund to satisfy $115,000 judgment), and *Amoco Cadiz* (quarterly net income of 3 times amount of judgment), *supra*, in which the federal courts waived the requirement for a supersedeas bond. Of particular concern is the Railroad's failure to explain in even general terms how it would come up with an additional $220 million in cash to pay the judgment (plus costs and postjudgment interest).

The Railroad is part of a complicated corporate structure involving multiple layers of subsidiaries, Crosby Aff. Exh. B, in an industry that has undergone substantial restructuring (witness BN's recent merger with Santa Fe). Against this backdrop, the Railroad has not made any representations about maintaining its net worth or its liquidity to pay the judgment, nor has it offered any protections against large amounts of its assets being transferred to its parent or some other entity in connection with a merger or acquisition. In this rapidly-changing world, it would be naive to blindly assume that the Railroad will necessarily have sufficient assets reasonably available to respond to a judgment of this size if the judgment is ultimately affirmed after what could be several years of further litigation. In these circumstances, the federal courts have required varying degrees of assurances in lieu of posting the full amount of the bond. *See Amoco Cadiz* (quarterly financial statements), *Olympia Equipment* (pledges of specific property and cash transfers to parent conditioned on assuming liability for

judgment), and *Hughes* (quarterly certifications that net worth continued to exceed 3 times the amount of judgment), *supra*.

Finally, based on the record before us, the Tribal Court's concerns with the Railroad's refusal to recognize its jurisdiction do not appear to be unreasonable. Rather than offering any assurances of payment in lieu of a bond, the Railroad in its application to this Court has remained extremely equivocal about the plaintiffs' ability to enforce its Tribal Court judgment in the other courts of the land:

> It is not uncommon for litigants to *attempt* to enforce tribal judgments in either state or federal courts and thus, the assets of Burlington Northern *may* be within reach of this court *if* the judgment is enforced in either federal or state court.

Railroad's Application dated February 12, 1996 at 6 (emphasis added). Judge Hatfield's recent decision in *Wilson v. Marchington and Inland Empire Shows*, 20 Mont. Fed. Reptr. 297 (Jan. 24, 1996), may help alleviate this concern, but leaves plenty of room for further argument under the specific facts of each case. The Railroad's obtaining a TRO from the U.S. District Court before it had even perfected its appeal suggests that it intends to make use of every possible opportunity to resist execution of the judgment should it be sustained on appeal.

In view of the foregoing, we provide the following guidance to the Tribal Court with respect to further proceedings on adequate security arrangements as a condition of the stay requested by the Railroad:

Appendix B

1. Rule 18(b) of the Crow Rules of Civil Procedure by its terms requires Railroad to post a surety bond "sufficient to guarantee performance of the judgment, and payment of costs on appeal." In view of the size of this judgment, however, and the possible unavailability or prohibitive costliness of obtaining a bond, the Tribal Court should consider some combination of a bond and adequate alternate security. These could include a properly structured letter of credit, posting of cash or negotiable government securities, pledges of specific physical assets, express guaranty of payment, maintenance of a specified net worth, and/or protections against transfers of liquid assets, as described in the cases, *supra*. In any event, we believe that Rule 18(b) requires that at least a substantial portion of the judgment should be secured by a supersedeas bond, and the remainder of the judgment should be fully secured. The Railroad bears the burden of demonstrating that alternate forms of security will provide protections equivalent to those afforded by a surety bond.

2. Upon a proper showing by the Railroad of the cost and difficulty in obtaining a bond, the Tribal Court should conduct such further hearings as are reasonably necessary to determine adequate security arrangements. Stipulations by the parties as to the details of those arrangements should be encouraged. However, since delay in posting security works to the disadvantage of plaintiffs, an immediate partial bond should be the prerequisite for extending the stay until all the security arrangements are resolved.

3. The Tribal Court's ultimate determinations on the stay and security arrangements will be treated with great deference by this Court.

4. Based on principles of comity, the Tribal Court should

stay all proceedings to actually execute on the judgment and any requirement for actually posting security during the pendency of any restraining orders issued by the U.S. District Court. However, we do not read that Court's TRO as preventing the Tribal Court from conducting further proceedings to determine the form of security. In fact, since the TRO has the effect of staying the judgment without any security, the Tribal Court should proceed to make its determinations so that the security arrangements (at least a substantial partial bond) may be implemented immediately upon the lifting of any restraining orders by the U.S. District Court.

IT IS HEREBY ORDERED that the Railroad's application for stay of judgment and waiver of supersedeas bond is DENIED.

DONE AND DATED this 21st day of February, 1996.

s/ William C. Watt
William C. Watt
Judge, Crow Court of Appeals

APPENDIX C — OPINION AND ORDER OF THE CROW COURT OF APPEALS FOR THE CROW INDIAN RESERVATION, CROW AGENCY, MONTANA DATED JUNE 17, 1997

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 97-010

ESTATES OF RED WOLF and BULL TAIL,

Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellant.

OPINION AND ORDER ON SURETY BOND

Defendant-Appellant Burlington Northern Railroad Company[1] has moved the court for a stay of execution on the judgment in this case, without a requirement that it post bond or any other form of security. According to the railroad, the motion is conditional, because it need not be addressed until the U.S. District Court's injunction barring enforcement of the judgment is vacated. *See Burlington Northern Railroad Co. v. Estate of Red Wolf, et al.*, 106 F.3d 868 (9th Cir. 1997), *petition for cert. filed* (U.S. May 16, 1997) (No. 96-1853).

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1. As a result of a merger effective December 31, 1996, the defendant corporation's name is now Burlington Northern and Santa Fe Railway Company. Crosby Aff. ¶ 2.

Appendix C

In light of the Ninth Circuit's decision cited above, Plaintiffs-appellees object to any further stay of execution on the judgment without the railroad being required to post a surety bond. However, it is these judgment creditors' position that while a bond in the full amount of the judgment, plus interest, must be posted immediately, they do not object to barring any execution on the bond until the railroad exhausts its federal review rights. We agree with the plaintiffs-appellees' position as being reasonable and compelled by Tribal law.

The judgment appealed from in this case was originally entered on February 6, 1996, in the aggregate amount of $250 million. The railroad requested the Tribal Court to waive the requirement in Rule 18(b) of the Crow Rules of Civil Procedure for posting a surety bond as a condition of a stay pending appeal. The Tribal Court denied the stay on February 9, 1996, and scheduled a hearing for approval of the surety bond.

The railroad immediately appealed the denial of the stay to this court, and without waiting for this court's decision or the Tribal Court' hearing, it obtained a restraining order and later a preliminary injunction from the U.S. District Court against the plaintiffs and the Honorable Tribal Court Judge. *Burlington Northern Railroad Company v. Estate of Red Wolf*, Cause No. CV 96-17-BLG-JDS (TRO dated Feb. 15, 1996). A divided panel of the U.S. Court of Appeals for the Ninth Circuit reversed and remanded on January 29, 1997, directing that the injunction be dissolved and the Federal court case stayed or dismissed pending the railroad's exhaustion of its remedies in the Tribal courts. *Red Wolf, supra*, 106 F.3d at 871. After the usual post-decisional motions were denied, the railroad filed a petition for writ of certiorari on May 16, 1997, which remains pending.

Appendix C

Meanwhile, twelve days after the Tribal Court denied the stay, a single judge of this court issued an expedited opinion and order denying the appeal as premature, but providing guidance to the Tribal Court on the requirements for the bond or other form of security under Crow R. Civ. P. 18(b). *Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad Co.*, Civ. App. Docket No. 94-31 (Feb. 21, 1996). In that opinion, which the full panel adopts, the court held that (1) the requirement for fully securing the judgment is a mandatory requirement for the stay under the Tribal code, and (2) a substantial portion of the judgment must be secured by a surety bond, but (3) considering the magnitude of the judgment, some combination of other forms of security for the remainder would be within the Tribal Court's discretion. However, in further Tribal court proceedings relating to the bond, the railroad refused to post a bond of any kind, or to propose any other alternative forms of security.

This court again assumed jurisdiction of this case after the Tribal Court denied the railroad's post-trial motions on December 30, 1996. On January 28, 1997, the plaintiffs filed a "Notice and Request" for voluntary reducing the judgment to a total of $25 million, or $5 million per heir. In that Notice, the plaintiffs also requested that the railroad be required to post a $30 million bond to guarantee payment of the amended judgment plus interest, and with the "additional condition that any payment thereon shall not be required until the [railroad] receives whatever federal review it properly seeks and is entitled to." Notice and Request at 4.

This court on February 6, 1997, issued an Order Governing Conduct of Appeal which, among other things, indicated the court's intention to remand to the Tribal Court for the limited

purpose of amending the judgment to the reduced amount, and requested the parties to brief certain procedural issues. The parties did not object to the limited remand for amending the judgment, and a separate remand order is being issued concurrently with this opinion and order. All further references to the judgment in this opinion are to the amended judgment which we have directed the Tribal Court to enter.

This court's February 6 order also assumed jurisdiction over the surety bond issue. The order stayed further proceedings to enforce the judgment until the railroad exhausted or waived its rights to Federal court review of the requirement to post bond with the Tribal Court. We reconsider that order, along with the railroad's request for a further stay without the requirement to post bond, in light of the parties' procedural briefs.

There is a certain facial attractiveness to the prudential concept of staying Tribal court enforcement proceedings until the judgment debtor has exhausted its Federal court remedies without posting a bond. It may be argued on grounds of comity and sound judicial administration that it doesn't make sense to require a bond to be posted while there is any chance that the Supreme Court will grant the certiorari petition and reinstate the district court's injunction.[2] However, deferring to the Federal courts in these circumstances only leads us in a circle, because they, in turn, have been directed to stay their hands as a matter of comity until Tribal court remedies are exhausted. Thus, in light of the Ninth Circuit's clear directive to dissolve the Federal court injunction, we must vacate paragraph 2 of this court's February 6th order, and turn to the railroad's arguments in support of a continuing stay without bond.

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2. We consider this possibility without presuming that this case, in its current procedural posture, merits the attention of Supreme Court of the United States.

Appendix C

We start with the express requirement of Tribal law, as discussed and upheld in this court's opinion of February 21, 1996, that posting security for the full amount of the judgment is mandatory under the language of Crow R. Civ. P. 18(b). We examine the railroad's arguments to determine if some overriding emergency or inequity would result from requiring the railroad to post a $30 million bond.

First, the railroad points out that there can be no question of its ability to satisfy the reduced judgment. In lieu of any security, the railroad offers to provide quarterly SEC filings periodically to the parties and the court. BN Brief at 5. Although its assets on the Reservation are not sufficient to satisfy the judgment, the railroad is not the type of entity that can conceal its extensive physical assets located throughout the United States. *Id.* This is consistent with the railroad's openly avowed strategy of forcing the plaintiffs to execute against off-reservation assets (which would not be necessary once a bond were posted with the Tribal Court). BN Brief at 8.

The railroad thus frames the question as whether it must sacrifice its assets by posting bond in order to preserve its review rights beyond this court. *Id.* It is apparent that the import of the railroad's request is to allow it to use special proceedings to enforce the equivalent of a foreign-country judgment as a device for obtaining review of Tribal Court due process in various *state* courts in other jurisdictions where the railroad's off-reservation assets are located. *See* BN Brief at 8-9 and notes 7 and 8.

We cannot create an exception to express statutory law in order to accommodate this strategy of attrition. We are confident that whatever extra-Tribal remedies the railroad may have after

this court completes its review will be appropriately protected by the Federal courts. *See, e.g., Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997). Conditioned as proposed by the plaintiffs, the bond would accommodate whatever federal review rights are determined to exist so that the railroad's property will be fully protected until it has had the opportunity to seek review of the judgment by the highest court in the land. That seems fair enough to us.

Next, the railroad argues that it is unjust to require it to post bond considering the excessive size of the judgment together with the serious questions it will raise regarding the conduct of the trial, and the plaintiffs' apparent inability to reimburse the cost if the railroad prevails on appeal. We have thrice previously declined to review the Tribal Court proceedings in this case on a piecemeal basis, and we decline again here to review the merits of the judgment in this ancillary proceeding. It is sufficient at this point to observe that the railroad's authorities regarding compensatory damages for non-economic losses are not controlling, and a multi-million dollar verdict in a wrongful death action has not been held by this court to be unconscionable *per se*.

Finally, the railroad argues that if a bond is required and it refuses to post the bond, its 50 miles of mainline track and critical unit-train coal traffic will be disrupted. This will result in extra cost to its customers, power blackouts in the Midwest, and the eventual crippling of America's industrial economy. BN Brief at 6; Robb Affidavit ¶¶ 3-4 (Exh. 4 to Motion for Stay). While some of those injuries may be irreparable, they are certainly and completely avoidable by the railroad simply posting the bond. As discussed above, this requirement cannot be held to be inequitable, when execution on the bond is conditioned upon exhaustion of Federal court review rights.

Appendix C

The issue of whether execution on the railroad's Reservation assets is pre-empted by federal law is not before us at this time. Expiration of the stay for failure to post bond would not necessarily result in execution against Reservation trackage (or necessarily limit execution on the judgment to those assets). Unless and until that series of eventualities must be dealt with in due course, this court will turn its attention to deciding the merits of the appeal. Toward that end, the court has settled questions on the composition of the record on appeal and established a briefing schedule in a separate order.

For the reasons stated above,

IT IS HEREBY ORDERED that:

1. Burlington Northern's conditional motion for stay of execution of the judgment without posting bond is DENIED;

2. This court's order in paragraph 2 of its Order Governing Conduct of Appeal dated February 6, 1997 (which stayed enforcement proceedings pending exhaustion of Burlington Northern's federal review rights) is VACATED;

3. Consistent with Crow R. Civ. P. 18(a), proceedings for enforcement of the judgment are STAYED until ten (10) days after entry of the Tribal Court's amended judgment on the limited remand; and

4. A further stay of proceedings to enforce the judgment shall be granted by the Tribal Court if appellant posts an acceptable surety bond with the Tribal Court in the aggregate amount of $30 million *before* the expiration of the stay ordered in paragraph 3 above, with the protective condition on the bond

that it will not be executed upon until Burlington Northern receives whatever Federal court review of the judgment to which it is entitled. Any deviation from the foregoing language as a condition on the bond shall be entertained by the Tribal Court only upon the stipulation of the parties.

DATED this 17th day of June, 1997.

s/ Victoria White
Victoria White, Chief Judge
Crow Court of Appeals

s/ Glen Birdinground
Glen Birdinground, Judge
Crow Court of Appeals

s/ William C. Watt
William C. Watt, Judge
Crow Court of Appeals

APPENDIX D — PROCEDURAL ORDER OF THE CROW COURT OF APPEALS FOR THE CROW INDIAN RESERVATION, CROW AGENCY, MONTANA DATED JUNE 17, 1997

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 97-010

ESTATES OF RED WOLF and BULL TAIL,

Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellant.

LIMITED REMAND ORDER AND REVISED ORDER GOVERNING CONDUCT OF APPEAL

The parties having filed briefs regarding the procedural questions raised in the Court's Order Governing Conduct of Appeal dated February 6, 1997, the Court issues this revised order which, for convenient reference, replaces the previous order in its entirety. A separate order is being issued concurrently regarding the stay of the amended judgment and the supersedeas bond. Now, therefore,

IT IS HEREBY ORDERED that:

1. This case is REMANDED to the Tribal Court for the

limited purpose of entering an amended judgment *nunc pro tunc* (i.e., retroactive to the date the original judgment was entered) in the amount of $5 million per heir, or $25 million total, plus post-judgment interest at ten percent (10%) per annum from February 6, 1996. The Tribal Court's inquiry on remand shall be limited to the sufficiency of the plaintiffs' affidavits consenting to the reduced judgment, which were filed with the Tribal Court during March, 1997, or such other evidence of the plaintiffs' knowing consent that the Tribal Court deems necessary. The judgment shall recite that it is without prejudice to the defendant's right to seek full review of the amended judgment.

IT IS FURTHER ORDERED that:

2. The parties in their appellate briefs shall address any issues they deem pertinent with respect to the Tribal Court's jurisdiction in light of the Supreme Court's decision in *Strate v. A-1 Contractors*, __ U.S. __, 117 S. Ct. 1404 (1997).[1] The parties may supplement the record with copies of such public records as they believe are relevant to the jurisdictional inquiry, including but not limited to treaties, statutes, Tribal ordinances, and right-of-way documents. These materials shall be set forth in a separate appendix annexed to the briefs.

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1. Based on our initial reading, Tribal Court jurisdiction in this case is not controlled by the Court's recent decision in *Strate v. A-1 Contractors*. The defendant's ownership and use of its right-of-way differs fundamentally from a motorist's use of a state highway, and has different implications for the exceptions to the Montana test, if that test applies here at all. Moreover, because of the nature of these differences and appellant's long-term and continuing presence on the Reservation, the Tribal Court's assertion of jurisdiction in this case does not require the railroad to defend in an "unfamiliar court." *Id.*, 117 S. Ct. at 1416. We therefore do not regard this case as one where it is evident that the Tribal Court lacks jurisdiction and the Federal court exhaustion requirement does not apply. *Id.* at 1416 n. 14.

Appendix D

IT IS FURTHER ORDERED that:

3. The official caption of this appeal and the docket number shall remain as they appear in the caption of this order for all appellate proceedings subsequent to the entry of the amended judgment. The Appellant's notice of appeal shall be deemed to be timely filed, without the necessity of filing another notice of appeal.

4. The schedules for transmitting the record and filing briefs under Rules 8 and 10 of the Crow Rules of Appellate Procedure are VACATED, and those schedules shall be governed by order of the court, including this order.

5. The record on appeal shall be transmitted promptly *after* the Tribal Court enters the amended judgment. One complete copy of the record, together with the original exhibits, shall be transmitted to the Court of Appeals pursuant to Crow R. App. P. 8(b). Except as listed in below, the record on appeal shall consist of the items listed in Crow R. App. P. 7(a), and the transcripts of the Tribal Court proceedings shall be in written form only.

(a) A copy of the videotape of Hon. Donald Stewart's address to the venire (*see Burlington Northern Railroad Company v. Red Wolf*, 106 F.3d 868, 872 (9th Cir., 1997) (Kleinfeld, J., dissenting), shall be included in the record. No other videotapes shall be included in the record on appeal.

(b) A transcription of the audiotapes of proceedings prior to December 12, 1994 (*see* BN's procedural brief at 11), shall be included in the record, or a statement thereof

as provided in Crow R. App. P. 7(b). The appellant shall be responsible for preparing the transcription or statement.

(c) Transcripts of any proceedings or statements in the Crow language shall include translations into English certified by the translator, and the record shall include any such translations submitted prior to the date of transmission.

(d) The costs of transcripts, a certified translation, and of duplicating one complete copy of the record pursuant to Crow R. App. P. 8(a) and (b) shall be paid or reimbursed by Appellant upon its receipt of the Clerk of the Tribal Court's statement(s).

(e) The Clerk of the Court of Appeals shall serve a Notice of Transmission of the Record on the parties' counsel.

6. The form and filing times for the parties' appellate briefs shall be as follows:

(a) Appellant's principal brief on appeal shall be filed within thirty (30) calendar days following the date of the notice of transmission of the record;

(b) Appellees' response brief shall be filed within twenty-five (25) days after receipt of appellant's brief;

(c) Appellant shall be permitted to file a reply brief within ten (10) days after receipt of appellees' brief;

(d) The form of the parties' briefs should conform generally to Ninth Circuit Rules 28-1 and 28-2 as

applicable, except that the maximum length shall be seventy (70) pages for the parties' principal briefs and twenty-five (25) pages for the reply, and references to the record shall be made to page numbers of the Excerpts of the Record; and

(e) The parties shall file with their briefs paginated "Excerpts of the Record" in conformance with Ninth Circuit Rule 30-1, except that the number of copies filed shall be the same as the number of briefs specified in Crow R. App. P. 9(a).

7. The Court will schedule oral argument by further order.

8. All motions for extension of time must be supported by a sworn affidavit and state opposing counsel's position regarding the extension.

DATED this 17th day of June, 1997.

s/ Victoria White
Victoria White, Chief Judge
Crow Court of Appeals

s/ Glen Birdinground
Glen Birdinground, Judge
Crow Court of Appeals

s/ William C. Watt
William C. Watt, Judge
Crow Court of Appeals